

**Crown Electrical Contracting, Inc. and Local 1, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner and Congress of Independent Unions, Intervenor.** Case 14-RC-12252

September 30, 2002

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered objections to an election held June 22, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for the Petitioner and 16 for the Intervenor, Congress of Independent Unions (CIU), with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>1</sup> and recommendations,<sup>2</sup> and finds that a certification of representative should be issued.

Petitioner's Objection 4 alleges, inter alia, that during a mandatory meeting with employees on June 20, 2001, the Employer promised to increase funding to the employee benefits plan without reducing the employees' wages on nonprevailing wage jobs. The hearing officer overruled this objection. Contrary to our dissenting colleague, we agree with the hearing officer.

The relevant facts are these. The Employer's collective-bargaining agreement with the Intervenor Congress of Independent Unions requires it to provide employees with certain basic benefits. These benefits, which include vacation, holiday pay, and medical insurance, are funded through a vehicle referred to as the Voluntary Employee Benefit Association (VEBA or Plan). The VEBA is funded by the Employer's monthly contributions, which are based on the employees' total hours worked and total gross wages. The Employer pays for employees' basic benefits with its VEBA contributions and any surplus is deposited into the VEBA. The VEBA is managed by employee trustees, who are authorized to provide benefits in addition to those set forth under the contract as well as to reduce such benefits. If the monthly expenses for basic employee benefits are greater

than the Employer's contribution, the VEBA trustees write the Employer a check to account for the difference. However, on several occasions in 1997 and 2000, the Employer permitted the VEBA to maintain a negative balance over to the next month.

The record identified four instances prior to the election in which the VEBA trustees reduced or eliminated benefits. Aside from the reduction in vacation benefits in November 2000, these other benefit changes occurred when the VEBA was financially sound. The evidence establishes that the VEBA experienced financial difficulty from sometime in 2000 through June 22, 2001, the date of the election. Upon being informed of the VEBA trustees' expressed concerns for the Plan's financial health in August 2000, the Employer increased his contributions to the VEBA.

During an employee meeting on June 20, 2001, 2 days before the election, employee Bob Hall, who was one of the Petitioner's witnesses, asked about the financial health of the VEBA. The Employer responded that he would do whatever it took to keep or maintain employees' current benefits. The record is clear that the Employer did not elaborate on his statement nor did any of the employees ask any followup questions.

Contrary to our dissenting colleague, we agree with the hearing officer that the Employer's statement that he would do whatever it took to keep employees' current benefits was nothing more than a lawful promise to maintain the status quo.<sup>3</sup> The hearing officer found, and we agree, that there was no context or history that would cause employees to interpret the statement as a promise to increase benefits.

Although the VEBA was experiencing financial difficulty prior to the election, there was no evidence that the VEBA trustees were planning to cut benefits nor evidence that employees should have reasonably anticipated a benefit reduction. As the hearing officer found, aside from the reduction in vacation benefits in November 2000, previous reductions in VEBA benefits had not been driven by the Plan's financial difficulty. In this regard, the VEBA trustees had previously reduced and eliminated benefits at times when the Plan was financially healthy. Similarly, when the VEBA was financially unstable in August 2000, the VEBA trustees explained the situation to the Employer, who then increased the Employer's contribution level. In these circumstances, the Employer's comment promised nothing more than what the employees already enjoyed.

<sup>1</sup> Although we would not take administrative notice of defined contribution welfare plans, as requested by the Petitioner, we have considered the article on defined contribution welfare plans submitted by the Petitioner and we find that it does not affect the result herein.

<sup>2</sup> In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the portions of the Petitioner's Objection 4 alleging that the Employer promised the employees a wage rate after benefits on prevailing wage jobs if the CIU was voted in, and that the Employer arranged for the election of a new employee trustee to the employee benefit plan.

<sup>3</sup> The Board has held that promises to maintain the status quo are not objectionable. See *Weather Shield Mfg.*, 292 NLRB 1, 2 (1988), revd. on other grounds 890 F.2d 52 (7th Cir. 1989); *El Cid, Inc.*, 222 NLRB 1315, 1316 (1976).

Our dissenting colleague contends that the Employer's statement was an unlawful promise of benefits to the employees, which warrants setting aside the election. In reaching this conclusion, our colleague speculates that, by promising to maintain current benefits, the Employer was actually promising to change employees' benefits from a system of fluctuating benefits—which our colleague contends is the status quo—to a system under which employees would be guaranteed the level of benefits they had at the time of the election. According to our colleague, this purported change in employees' benefits was an improvement for employees.

Initially, we note that the dissent's reference to employees' benefits as fluctuating is a mischaracterization insofar as the record identifies only four changes that have taken place in the level of VEBA benefits since the VEBA was instituted. Further, the status quo is not defined by the small number of VEBA benefit changes, as the dissent suggests. *Rather, the status quo is a VEBA in which benefits can only be changed by its Trustees and which, from time to time, receives supplemental financial assistance from the Employer.*

We also reject our dissenting colleague's contention that employees would have reasonably construed the Employer's statement as a guarantee that benefits would not fall below their existing level at the time of the meeting. First, the record shows that the issue raised at the meeting was the fiscal stability of the VEBA, not the level of benefits. As noted, the Employer previously has provided supplemental financial assistance to the VEBA when necessary to maintain the plan. Second, benefit levels are determined by the trustees of the plan, and the record shows that with one exception previous reductions in VEBA benefits have not been related to the financial health of the plan. Therefore, the Employer's statement was nothing more than a guarantee of the status quo.

Under the dissent's view, the employees would have interpreted the Employer's comment as a promise to change the nature of the VEBA. In this respect, by purportedly guaranteeing that benefits would not be reduced below their existing level, the VEBA trustees would no longer have the discretion to remove or reduce a particular benefit; such a situation would arise, for example, where the trustees determine that a benefit is no longer in the employees' best interest. It is inconceivable that employees would have believed that this was the Employer's intention. Likewise, as it is undisputed that the Employer never had a role in determining what benefits the trustees offered in addition to those provided in the contract, it is also unreasonable to assume that employees would have interpreted an isolated comment as a promise to change this system.

Our colleague says that the Employer has not shown that his statement was based on a legitimate purpose other than influencing the results of the election. To the contrary, we find that the Employer's comment was consistent with his past business practice. In this regard, after being informed that the VEBA was experiencing financial trouble in August 2000, the Employer increased his contributions to the VEBA. Similarly, for several months in 1997 and 2000, when the monthly benefit expenses were greater than the Employer's contribution, rather than requiring a check from the VEBA trustees, the Employer allowed the VEBA to maintain a negative balance over to the next month. In this respect, the Employer was loaning money to the VEBA. In each of those instances, the Employer's purpose was to ensure that the VEBA could maintain its respective level of benefits.

Finally, our finding that the Employer's statement was not objectionable finds further support in the fact that the Employer's statement was not made as part of a campaign speech or otherwise initiated by the Employer.<sup>4</sup> Instead, the statement was simply made in response to a question from an employee, who was a witness for the Petitioner. Moreover, the Employer did not elaborate on the statement, and the employees did not ask him any followup questions. It is highly improbable that the Employer saw this employee's question as an opportunity to influence the election.

Accordingly, we adopt the hearing officer's recommendation to overrule this objection and we will issue a certification of representative.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Congress of Independent Unions, and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate:

All journeyman and apprentice electricians and communication employees employed by the Employer at its 3630 South Broadway, St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

MEMBER LIEBMAN, dissenting.

Two days before the representation election in this case, during a period of financial difficulty for the trust

<sup>4</sup> See *Duo-Fast Corp.*, 278 NLRB 52, 53 (1986) (fact that manager's comment was in response to employee's question considered in finding no implied promise of benefits); cf. *U.S. Ecology Corp.*, 331 NLRB 223, 228 (2000) (respondent did not engage in direct dealing where, among other things, the respondent did not initiate communications with employees but rather, sent its letter in response to employees' questions).

that provided medical and other employee benefits, the Employer told employees that he would do whatever it took to keep their current level of benefits. The majority concludes that this statement was not an objectionable promise of benefits, designed to influence the election, but was simply a permissible pledge to maintain the status quo. That view, however, is based on a misunderstanding of what the status quo here actually was. Because the status quo allowed for benefits to *fall*—which was precisely the employees’ concern—a promise to maintain the current level of benefits offered employees something more than they already had. Nothing in the record suggests a reason for this promise other than a desire to influence the election. Consequently, I would order a new election.

The essential facts are simply stated: The Employer’s contract with the Intervenor Congress of Independent Unions obligates it to provide employees with a basic level of certain benefits. These benefits (vacation, holiday pay, and medical insurance) are funded through a trust known as the Voluntary Employee Benefit Association (VEBA). The Employer makes monthly contributions to the VEBA based upon the number of hours worked by employees and total gross wages. The trust is administered by employee trustees, who have the authority to increase benefits above the level specified by the contract as well as to reduce benefits that are above the specified level. The benefits paid to employees from the VEBA are therefore variable, but may not fall below the minimum specified by the contract. The record indicates that the trustees have, at various times, exercised their authority to increase and reduce benefit levels.

In the spring of 2001, the VEBA was in financial difficulty, which led to rumors among employees that the VEBA was going broke. An employee meeting was held on June 20, 2001, 2 days before the election. After the Employer read a prepared statement about the upcoming election, a discussion followed. In response to a question from employee Bob Hall about what would happen if the VEBA went bankrupt, the Employer told employees that he would do whatever it took to maintain their *current* (above minimum) level of benefits.

The majority agrees with the hearing officer that this statement was merely a promise to maintain the status quo and was therefore not objectionable. I disagree. The evidence shows that under the status quo, the benefits paid to employees fluctuated (above the contractual minimum) at the discretion of the trustees. But it was not this system of fluctuating benefits, with its uncertainty for employees, that the Employer promised to maintain. Rather, he promised to maintain the specific level of benefits that existed at the time of the meeting. Unlike

the majority, I would find this guarantee of a specific level of benefits to represent a substantial change, for the better, in the status quo.

The majority’s assertion that employee benefits cannot be characterized as fluctuating because the record identifies only four changes that have occurred since the VEBA was instituted is clearly incorrect. Regardless of how the benefits have been changed, what matters is that, as discussed above, the VEBA gives the trustees the authority to increase or decrease the level of employee benefits. In fact, the trustees have altered benefit levels pursuant to that authority. In these circumstances, the majority cannot fairly claim that the benefits are unwavering, or that the status quo can be defined as a fixed level of benefits.

I would further find that employees would have reasonably interpreted the Employer’s statement to be a guarantee that benefits would not be reduced below the existing level in the future. In my view, this promise of a benefit to employees only 2 days before the election, at a time when employees were unsure about what would happen to their benefits, would have tended to influence the outcome of the election.

My colleagues say that there is no evidence that employees were concerned about a possible reduction of benefits at the time of the June 20 meeting. To the contrary, the record indicates that by June the VEBA could not pay certain bills that were due, and that rumors were circulating among employees that the VEBA was going broke. The record also indicates that employee benefits had been reduced approximately 6 months earlier, in November 2000, due to the VEBA’s financial difficulties. Thus, it seems obvious that employees who heard the rumors would be concerned about a possible loss of benefits, as the trust apparently is the sole source of those benefits. Indeed, given these facts, what else could have prompted employee Hall to ask about the VEBA’s financial stability at the June meeting? In this context, employees reasonably would have interpreted the Employer’s statement as an assurance that their benefits would be maintained at the existing level despite the apparent financial instability of the VEBA. And that clearly would be a change in the status quo.

It is well established that the Board will infer that benefits granted during the preelection critical period are coercive unless the employer shows that its actions were motivated by a legitimate business purpose unrelated to the election. See *Network Ambulance Services*, 329 NLRB 1 (1999) (and cases cited therein). Here the majority finds that the Employer’s promise to maintain a specific level of benefits was consistent with the Em-

ployer's past business practices and is therefore unobjectionable. I disagree.

In 1997 and 2000, the Employer allowed the VEBA to carry over a negative balance from one month to the next. In August 2000, when the VEBA was experiencing financial difficulty, the Employer increased his contributions to the trust. Unlike here, however, in those instances there is no evidence that the Employer's intention was to guarantee that employee benefits would remain at some specified level. Indeed, my colleagues concede that the Employer "never had a role in determining what benefits the trustees offered in addition to those provided in the contract." Additionally, there is no evidence that, in the past, benefits remained at a particular level as a result of the Employer's intervention. Rather, the evidence shows that benefits were subsequently reduced in November 2000, a few months after the Employer increased his contributions. Thus, contrary to the majority, I would find that the Employer's promise to maintain benefits at their current level was not consistent with past business practice and is therefore objectionable.

Finally, I disagree with the majority that the circumstances in which the statement was made supports a finding that it was not objectionable. At the June 20 meeting, the Employer read a prepared statement about the representation election, followed by a discussion period during which employee Hall asked about the VEBA. Contrary to the majority, I do not find it unlikely that the Employer would have viewed this as an opportunity to influence the votes of employees. Further, given the nature of the statement, it does not matter that it was made in response to an employee question rather than the Employer's initiative.<sup>5</sup> Consequently, I would find the Employer's statement to be objectionable and would order a new election.

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<sup>5</sup> See, e.g., *BRK Electronics*, 248 NLRB 1275, 1276-1277 (1980) (finding that employer's statement in response to employee question was objectionable where employer told employees that pay raises were contingent on the outcome of the upcoming representation election).